Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANWAR ALKHATIB,
Plaintiff,

-against-

Case No. 13-CV-2337 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SHAHADAT TUHIN
Plaintiff,

-against-

Case No. 13-CV-5643 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

SIMON GABRYS,
Plaintiff,

-against-

Case No. 13-CV-7290 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

BORIS FREIRE, et al,
Plaintiffs,

-against-

Case No. 13-CV-7291 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

ZHENG HUI DONG,
Plaintiff,

-against-

Case No. 14-CV-2980 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

NASRIN CHOWDHURY,
Plaintiff,

-against-

Case No. 14-CV-2981 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants,

TAREQUE AHMED
Plaintiff,

-against-

Case No. 15-CV-0284 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

YSABEL BANON,
Plaintiff,

-against-

Case No. 15-CV-4691 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

CHEA SUNG PARK,
Plaintiff,

-against-

Case No. 15-CV-5374 (ARR) (SMG)

NEW YORK MOTOR GROUP LLC,
PLANET MOTOR CARS, INC.,
MAMDOH ELTOUBY, AND
NADA SMITH
Defendants.

PLAINTIFFS' PRETRIAL MEMORANDUM OF LAW

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Plaintiffs in the above-captioned cases respectfully submit this pretrial memorandum of law in accordance with Section IV.A.7 of the Court's Individual Practices and Rules.

PRELIMINARY STATEMENT

Defendants Mamdoh Eltouby and Nada Smith hired, supervised, and facilitated Julio Estrada's work at their car dealerships – two alter egos of Mr. Eltouby's doing business as New York Motor Group, LLC ("NYMG") and Planet Motor Cars, Inc. ("PMC" and, together with NYMG, the "Dealerships" or the "Dealership Defendants") – where together they defrauded Plaintiffs and numerous others out of hundreds of thousands of dollars.

The fraudulent scheme followed a familiar pattern. A consumer – typically an immigrant with limited English-language skills and little or no experience obtaining credit – would be lured to the Dealerships by Internet advertisements for "deals" on used cars. Often Mr. Eltouby, the owner, or his daughter and the manager, Mrs. Smith, would steer the consumer to Mr. Estrada, the finance manager. Mr. Estrada lied to consumers, telling them they were required to obtain financing to buy NYMG's cars, and that, in light of their low incomes or limited credit history, they needed to purchase additional services and products as prerequisites to the extension of credit. He also lied about the financing structure and the total amounts to be financed – at times guaranteeing automatic refinancing at a lower interest rate with lower monthly payments after a set number of timely payments.

Mr. Estrada instructed unsophisticated consumers to sign contracts that he would not allow them to read, or which were partially blank, assuring them that he was duly authorized to complete the documents later in accordance with the agreed-upon terms. Unbeknownst to the consumers, the Dealership would populate the Retail Installment Contracts ("RICs") – standardized contracts used for automobile finance loans – with vastly larger loan sums than what the consumers had agreed to, causing the consumers to incur as much as tens of thousands of dollars in loans above any amount they actually received, much less agreed to borrow. Defendants then assigned the fraudulent RICs to national banks, which in turn contacted Plaintiffs by phone and U.S. mail to collect the inflated sums stated in the RICs, sometimes repossessing Plaintiffs' vehicles if they failed to make payments.

Upon learning from the banks of the inflated sums that they were reported to have borrowed, consumers returned to the Dealerships to complain. When confronted, Mrs. Smith and Mr. Eltouby strung Plaintiffs along with lies, assuring them that Mr. Estrada's representations had been accurate, promising to investigate and address their complaints, dissuading them from contacting law enforcement authorities, and encouraging them to continue making monthly loan payments in the interim.

The evidence in this case shows that Mr. Eltouby and Mrs. Smith were aware of, implemented, facilitated, and knowingly assisted in the fraudulent scheme and deceptive business practices. The fraud and deception occurred under the watchful eye of both Mrs. Smith, the Dealerships' "manager," and Mr. Eltouby, who admits he listened to audio recordings of Mr. Estrada's conversations with customers.[1] Indeed, Mr. Eltouby hired Mr. Estrada and placed him in charge of consumer financing knowing that he had been criminally convicted of defrauding consumers.

By participating in the criminal enterprise, Mrs. Smith and Mr. Eltouby committed numerous crimes and common law torts. Despite their repeated denials of responsibility for the fraud perpetrated on their lot, under their direct supervision, and through their alter ego entities, the evidence at trial will show that, in addition to the Dealerships, Mr. Eltouby and Mrs. Smith are personally liable to Plaintiffs and judgment should be entered against them.

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[1] These audio recordings were never produced in discovery despite repeated requests and are the subject of a spoliation motion filed in connection with the pretrial order.

THE PARTIES

Plaintiffs are ten working-class New Yorkers who were victims of the fraudulent scheme. They are:

- Anwar Alkhatib: Defendants defrauded Mr. Alkhatib in December 2012. Mr. Alkhatib was informed that he would have to forfeit a deposit of nearly $10,000 unless he agreed to over $7,000 in additional financing charges as well as to buy thousands of dollars of products that were of no use to him.

- Nasrin Chowdhury: Defendants defrauded Ms. Chowdhury in January 2013. Ms. Chowdhury was dishonestly informed that, to qualify for better financing, she had to purchase unnecessary products such as a service contract, and she was fraudulently told that she could cancel these items before paying for them in full. Further, Mr. Estrada instructed her to sign a RIC without the numbers filled in. She will testify that she later learned that he filled in numbers that were very different than what she agreed to.

- Tareque Ahmed: Defendants defrauded Mr. Ahmed in January 2013. After dealing extensively with both Mrs. Smith and Mr. Estrada – including objecting to delays in returning paperwork to him after he put down a large deposit – Mr. Ahmed agreed to borrow a little over $2,000 in a short-term financing agreement for purchase of a used car. Shortly thereafter, Mr. Ahmed learned that a national bank had been assigned a RIC purporting him to have borrowed $15,000 (nearly $13,000 more than he agreed to borrow or ever actually received) repayable at a high interest rate over 72 months. When he could not make all of the repayments, Mr. Ahmed's car was repossessed.

- Boris Freire and Miriam Ocasio: Defendants defrauded Mr. Freire and his wife, Miriam Ocasio, in February 2013. After placing a $7,500 down payment for a car advertised at $14,900, Mr. Freire was told three days later that he would have to pay an additional amount of over $10,000 in financing charges to complete the purchase. Though Mr. Freire and Ms. Ocasio were promised an opportunity to refinance under better terms, Ms. Smith continually put them off and made excuses for Mr. Estrada's refusal to make good on his promises.

- Zheng Hui Dong: Defendants defrauded Ms. Dong in April 2013. After she paid $13,500 in cash for a vehicle and believed she had purchased it outright, Ms. Dong was later informed that a national bank would attempt to collect an additional $38,000 from her based on a forged RIC. When Ms. Dong brought this to the attention of Mrs. Smith, Mrs. Smith did not assist her in rectifying the situation.

- Chea Sung Park: Defendants defrauded Mr. Park in April 2013. Mamdoh Eltouby directed Mr. Park, who speaks limited English, to confer with Mr. Estrada about obtaining financing. The RIC assigned to a national bank reflects over $20,000 more in loan amounts and financing fees than Mr. Park agreed to borrow or pay.

- Ysabel Banon: Defendants defrauded Ms. Banon in June 2013. Ms. Banon agreed to take out a loan for $5,000 but later learned from M&T that her loan was recorded as $36,739.74 at 5.98%, requiring her to repay $43,804.08 over the course of six years. When she returned to the Dealerships repeatedly to complain, Ms. Banon interacted with both Mr. Estrada and Mrs. Smith, who continued to deceive her.
- Shahadat Tuhin: Defendants defrauded Mr. Tuhin in June 2013 when Mr. Estrada made false representations to him about the size of the loan outlined in the RIC he signed. After learning of the terms memorialized in the RIC, Mr. Tuhin was lied to repeatedly by Mrs. Smith to coax him into continuing making payments for money he never received or agreed to borrow. Mrs. Smith repeatedly refused Mr. Tuhin's lawful revocation of acceptance under the N.Y. Uniform Commercial Code, including Mr. Tuhin's efforts to return the vehicle he had purchased.
- Simon Gabrys: Defendants defrauded Mr. Gabrys in December 2013. The RIC assigned by Defendants to a national bank reflected a loan of over $10,000 more than what Mr. Gabrys ever actually borrowed or received, much less agreed to borrow.

In this trial, Plaintiffs pursue their claims against four remaining Defendants: Mr. Eltouby and Mrs. Smith, who oversaw and implemented the fraudulent and deceptive practices and who participated in the criminal enterprise's affairs through a pattern of mail and wire fraud, and the Dealerships, two entities that are alter egos of Mr. Eltouby.

Plaintiffs have settled with the three bank defendants – M&T Bank, Capital One Auto Finance, Inc. ("Capital One"), and Santander Consumer USA, Inc. ("SCUSA").[2] Plaintiffs have withdrawn their claims against Defendant Julio Estrada, who pleaded guilty in December 2013 to grand larceny, was ordered to pay restitution of $118,000, and is presently serving time at the Lincoln Correctional Facility under the supervision of the Department of Corrections.

[2] Capital One formally withdrew its cross claims upon settling with Plaintiffs in May 2015. *See Alkhatib v. NYMG*, No. 13-cv-2337, Dkt. No. 108 (E.D.N.Y. May 19, 2015). Plaintiffs have attempted repeatedly to reach counsel for two of the bank defendants – Santander Consumer USA, Inc. and M&T Bank – over the past two weeks to confirm whether their clients intend to pursue cross claims against the four remaining defendants. The banks' attorneys have not responded to these queries and, based on their decision not to partake in the Joint Pretrial Order, Plaintiffs assume that the banks have decided not to pursue further claims.

ARGUMENT

As discussed below, Plaintiffs pursue five claims against Mrs. Smith, Mr. Eltouby, and the two Dealership Defendants. Plaintiffs will demonstrate that these four defendants are liable for violations of civil RICO, common law fraud, N.Y. General Business Law Section 349 (deceptive business practices) and Section 350 (false advertising), and negligent hiring. Additionally, six plaintiffs pursue claims against the Dealership Defendants for violations of the Truth in Lending Act ("TILA").

Pursuant to the stipulation dated February 23, 2017 and signed by the Court on February 27, 2017, Plaintiffs have withdrawn their claims for usury, breach of contract, assault, battery, and violation of the N.Y. Motor Vehicle Retail Installment Sales Act, the N.Y. U.C.C., and the Magnuson Moss Warranty Act.

A. Plaintiffs' Civil RICO Claims

Plaintiffs pursue claims pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*. A plaintiff asserting a civil RICO claim must allege "(1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (quoting *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir. 2001)). "A defendant may be held liable for violating RICO if the defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly participated in the affairs of an enterprise involved in interstate commerce." *Alkhatib v. N.Y. Motor Grp., LLC*, 2015 U.S. Dist. LEXIS 72055, at *28-29 (E.D.N.Y. June 3, 2015) (citing *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 6 (2010)).

1. The RICO Enterprise

A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An "association-in-fact" enterprise must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 956 (2009).

Plaintiffs will prove at trial the existence a RICO enterprise comprised of three used car dealerships owned, operated, overseen or otherwise controlled by Mr. Eltouby, or in which Mr. Eltouby is or was an officer. These three dealerships are NYMG, PMC, and Hillside Motors, LLC (together, the "Dealership Enterprise"). The Dealership Enterprise advertised on the Internet, maintained lots where secondhand cars could be viewed, and employed personnel with whom purchases of secondhand cars could be arranged. Defendants will further establish that the Dealership Enterprise's purpose was to engage in fraud as a matter of course.

In the past, Defendants have mistakenly contended that the Dealership Enterprise is legally insufficient for RICO purposes because it is indistinguishable from the pattern of racketeering. Magistrate Judge Gold correctly disposed of this argument in his Report and Recommendations, noting that the evidence used to prove the existence of the enterprise and the pattern of racketeering may "coalesce." *Alkhatib*, *LLC,* 2015 U.S. Dist. LEXIS 72055**Error! Bookmark not defined.**, at 33 (quoting *Boyle*, 554 U.S. at 947). Thus, it is of no moment that the evidence used to establish a functioning enterprise may "coalesce" with the evidence that establishes the predicate acts.

2. *The Enterprise Affected Interstate Commerce*

"The law in this Circuit does not require plaintiffs to show more than a minimal effect on interstate commerce." *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001). In this case, the Dealership Enterprise routinely assigned fraudulently-obtained and fraudulently-altered RICs to out-of-state banks, including SCUSA, which is based in Texas, and Capital One, which is based in Virginia.[3] An enterprise that routinely assigns fraudulent loan documents to out-of-state banks should be deemed to affect interstate commerce as a matter of law. *See Allstate Ins. Co. v. Afanasyev*, 2016 U.S. Dist. LEXIS 19084, at *33 (E.D.N.Y. Feb. 11, 2016) ("Here, the enterprises engaged in a scheme to submit fraudulent claims to plaintiffs, all of whom are national insurance companies with principal places of business in Northbrook, Illinois. Several courts have found that identical facts are sufficient to establish the necessary impact on interstate commerce.").[4]

3. *Defendants' Pattern of Racketeering*

Defendants conducted the affairs of the Dealership Enterprise through a pattern of mail fraud and wire fraud. "Mail and wire fraud under 18 U.S.C. §§ 1341 and 1343, respectively, require proof of three elements: (1) the existence of a scheme to defraud, (2) the defendant's knowing or intentional participation in the scheme, and (3) the use of the mails or interstate transmission facilities in furtherance of the scheme." *Alkhatib, LLC*, 2015 U.S. Dist. LEXIS

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[3] The parties' pretrial stipulations include a factual stipulation as to the location of SCUSA's and Capital One's headquarters.

[4] Additionally, Mr. Eltouby purchased many of the vehicles on his lot in Pennsylvania and brought them to New York for the Dealership Enterprise to sell as part of their scheme to defraud consumers.

72055, at *36-37. Importantly, "it is not necessary that the telephone calls or mailings contain misrepresentations, so long as they advance the purpose of executing the scheme" and "[a] defendant accused of mail or wire fraud need not be the one who sent the mailing or placed the call." *Sterling Interiors Grp. v. Hayworth, Inc.*, 1996 U.S. Dist. LEXIS 10756, at *17-18 (S.D.N.Y. July 29, 1996). Further, reliance is not an element of mail fraud, and Plaintiffs need not plead that they relied on, or even received, any fraudulent mailing or wire communication in order to establish a pattern of racketeering activity by any defendants. *Sluka v. Estate of Herink*, 1996 U.S. Dist. LEXIS 20330, at *10 (E.D.N.Y. Feb. 9, 1996 (Ross, J.).

Here, Plaintiffs will establish at trial that Defendants made a significant number of transmissions through the interstate wires in furtherance of their fraudulent scheme, including posting Internet advertisements, pulling credit information, transmitting RICs to out-of-state banks, and receiving wire transfers of funds from out-of-state banks in exchange for the RICs.

Further, Defendants assigned fraudulent RICs to numerous out-of-state banks with foresight that those banks would then use the mails and wires to attempt to collect money that Plaintiffs never, in fact, borrowed. These actions, too, are sufficient to find that Defendants participated in the Dealership Enterprise through a pattern of mail and wire fraud. *United States v. Brooks*, 2009 U.S. Dist. LEXIS 99997, at *30 (E.D.N.Y. Oct. 27, 2009) ("[I]t is not significant for purposes of the mail fraud statute that a third-party, rather than the defendant, wrote and sent the letter at issue, providing, . . . the defendants could reasonably have foreseen that the third-party would use the mail in the ordinary course of business as a result of defendants' act.") (quoting *United States v. Bortnovsky*, 879 F.2d 30, 36 (2d Cir. 1989)); *see also Alkhatib*, 2015 U.S. Dist. LEXIS 72055, at *42.

4. Relatedness and Continuity

At trial, Plaintiffs will introduce evidence from third parties establishing that Defendants' pattern of racketeering activity extended longer than 24 months and, further, that it would have lasted indefinitely had it not been for the intervention of law enforcement. These facts will prove both an open- and a closed-ended pattern of racketeering. *See Alkhatib, LLC*, 2015 U.S. Dist. LEXIS 72055, at *61-62 (stating standard for open- and closed-ended patterns). Further, as Judge Gold recognized, "[t]he enterprises are comprised of the used car dealerships that made the sales and the banks that provided the financing. The predicate acts are thus each related to the RICO enterprises described in the complaints, and plaintiffs therefore satisfy RICO's relatedness requirement." *Id*. at *58.

5. Injury and Causation

In a civil RICO action, "plaintiffs must allege an injury both actually and proximately caused by a predicate act of racketeering to have standing to sue under RICO." *Sluka v. Estate of Herink*, 1996 U.S. Dist. LEXIS 20330, at *10 (E.D.N.Y. Feb. 9, 1996 (Ross, J.). Plaintiffs will establish at trial that Defendants' pattern of mail and wire fraud directly injured them, *inter alia*, by causing third-party banks to collect money from them that they never borrowed and to repossess their cars if they could not pay.

B. Common Law Frauds

The elements of common law fraud are "(1) the defendant made a material false representation. (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Fidelity Funding of California, Inc. v. Reinhold*, 79 F. Supp. 2d 110, 117

(E.D.N.Y. 1997) (Ross, J.). In this case, there has been no effort seriously to dispute Plaintiffs' testimony, to be repeated at trial, that they were lied to when they signed the RICs, that they reasonably relied on the fraudulent misrepresentations that were made to them, and that they were damaged as a result. Further, as discussed below, Plaintiffs will prove that Defendants acted with fraudulent intent and aided and facilitated the fraudulent scheme.

1. Mamdoh Eltouby and Nada Smith Are Liable for Common Law Fraud

Mr. Eltouby and Mrs. Smith are liable for common law fraud in light of their (i) direct misrepresentations to Plaintiffs, (ii) fraudulent intent, (iii) knowing and essential participation in the scheme to defraud, and (iv) substantial assistance to Mr. Estrada. Each of these paths to liability is addressed below:

- **Scheme Liability**: Under New York law, "[i]t is well established that liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud." *Kuo Feng Corp. v. Ma*, 248 A.D.2d 168, 168 (1st Dep't 1998); *Danna v. Malco Realty, Inc.*, 51 A.D.3d (2d Dep't 2008) (same). Plaintiffs will present evidence at trial proving Mr. Eltouby's and Mrs. Smith's knowledge and awareness of the fraud, and their knowing and essential participation in the scheme to defraud.

- **Aiding and Abetting Fraud**: Mr. Eltouby and Mrs. Smith are also liable for aiding and abetting fraud because they knew of Mr. Estrada's fraudulent conduct and provided substantial assistance. *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 507 (S.D.N.Y 2001); *Nat'l Westminster Bank USA v. Weksel,* 124 A.D.2d 144, 149 (1st Dep't 1987).

- **Direct Misrepresentations**: Mr. Eltouby's and Mrs. Smith's direct misrepresentations to consumers who returned to complain about doctored RICs were essential to preserving the fraudulent scheme because they dissuaded consumers from reporting the fraud to law enforcement and encouraged them to continue making payments. These misrepresentations render them liable for fraud. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 n.11 (2d Cir. 2011) (individual engages in securities fraud if she engages in "conduct undertaken to keep the securities fraud Ponzi scheme alive") (internal quotation marks omitted); *United States v. Stirling*, 571 F.3d 708, 726 (2d Cir. 1978) (Defendant guilty of participating in conspiracy and scheme to defraud where defendant's role was to keep the scheme secret so that it could be kept alive).[5]

2. *The Dealerships Are Liable for Common Law Fraud*

The knowledge of the Dealership Defendants is necessarily derived from its agents, including its finance manager, Julio Estrada, and they are therefore liable for Estrada's fraudulent statements and actions. *See, e.g.*, *Williams v. Freeman*, 208 N.Y.S. 691, 698 (N.Y. 1925) ("A principal who accepts the benefits of a transaction negotiated by his agent adopts with such benefits the means taken to procure them."); *see also Center v. Hampton Affiliates, Inc.,* 66 N.Y.2d 782, 784 (N.Y. 1985) ("The general rule is that knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it."); *Chaikovska v. Ernst & Young, LLP*, 913 N.Y.S.2d 449, 451-52 (4th Dep't 2010) (noting that the misconduct of managers acting within the scope of their employment will normally be imputed to the corporation).[6]

Here, Plaintiffs will prove at trial that Mr. Estrada defrauded Plaintiffs and others while acting within the scope of his authority as finance manager and while under the watchful supervision of Mr. Eltouby, the owner, and Mrs. Smith, the manager. Under these circumstances, liability for the fraud may properly be imputed to each of the Dealerships.

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[5] Moreover, the individual defendants are liable for fraud if their misrepresentations were reckless. *Amusement Indus., Inc. v. Buchanan Ingersoll & Rooney, P.C.*, 2013 U.S. Dist. LEXIS 8569, at *43-45 (S.D.N.Y. Jan. 22, 2013) (Magistrate Judge's Report & Recommendation), *adopted*, 786 F. Supp. 2d 758 (S.D.N.Y. 2011).

[6] *Accord SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972); *see also United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978) (corporation liable for criminal acts of employees "if done on its behalf and within the scope of the employees' authority") (citations omitted).

C. General Business Law

Plaintiffs pursue claims for violations of N.Y. General Business Law Section 349 (deceptive business practices) and Section

350 (false advertising). To prevail on either of these claims, Plaintiffs must prove that:

(1) the challenged acts or practices were consumer-oriented;

(2) the challenged acts or practices were materially deceptive or misleading; and

(3) Plaintiffs suffered injury as a result of the allegedly deceptive act or practice.

Koch v Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (N.Y. 2012); *Koch v. Greenberg*, 14 F. Supp. 3d 247, 261 (S.D.N.Y. 2014) ("GBL § 350 prohibits false advertising and has the same elements as § 349, except for the requirement that the Defendant's *advertisement* (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury.") (emphasis in original and internal quotation marks omitted).

In this case, the deceptions that will be proven at trial were numerous and material, and directly caused Plaintiffs substantial pecuniary and non-pecuniary harm. Additionally, individual Defendants Eltouby and Smith are liable if they are found to have aided and abetted the Dealerships' deceptive business practices and false advertising. *See Banks v. Consumer Home Mortg., Inc.*, 2003 U.S. Dist. LEXIS 8230, *37-38 (E.D.N.Y. Mar. 27, 2003).

D. Negligent Hiring

To prevail on their claims for negligent hiring, Plaintiffs must demonstrate:

1. That the Dealerships and Mr. Eltouby, on the one hand, and Mr. Estrada, on the other, were in an employer-employee relationship
2. Mr. Eltouby and the dealerships hired Mr. Estrada even though they knew (or should have known) of his propensity for engage in conduct which would cause injury.

   That the tortious conduct was committed on the dealerships' or Mr. Eltouby's premises or with their vehicles.

Ehrans v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004). Further, this Court has recognized that "[a] claim for negligent hiring or supervision can only proceed against an employer for an employee acting outside the scope of her employment." *Hill v. City of New York*, 2005 U.S. Dist. LEXIS 38926, at *35-36 (E.D.N.Y. Dec. 29, 2005) (Ross, J.) (internal quotation marks omitted).

The evidence here will demonstrate that Estrada was an employee of the Dealerships and Mr. Eltouby. During the relevant time period, Estrada worked exclusively for the Dealerships under the regular instruction of Mr. Eltouby and Mrs. Smith. He performed work which is part of the Dealerships' regular business, under a schedule generally set by Mr. Eltouby and using instrumentalities of the Dealerships and Mr. Eltouby. He could not assign his work to others, and he performed work which did not require specialized training or advanced skills. He could not and did not hire or pay his own assistants, and he was not in business apart from his position with Defendants. In sum, the manner and means by which Estrada performed his work was controlled by the Dealerships and Mr. Eltouby, and he was therefore their employee. *See, e.g., Legeno v. Douglas Elliman, LLC*, 311 Fed. Appx. 403, 404, n. 4 (2d Cir. N.Y. 2009) (citations omitted) (Common law agency principles considered in determining if an individual is an employee or an independent contractor include "(1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. Although no one factor is dispositive, the greatest emphasis should be placed on the first factor -- that is, on the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks.").

Deposition testimony has revealed – and it will be established at trial – that Mr. Eltouby hired Mr. Estrada to work at NYMG knowing that he had criminally defrauding consumers at another car dealership. Mr. Eltouby and the Dealerships knew, or should have known, of Mr. Estrada's propensity to commit just the kind of wrongful conduct that occurred here, on the Dealerships' property and with Plaintiffs' vehicles. Accordingly, Mr. Eltouby's and the Dealership's employment of Mr. Estrada was negligent.

E. Truth in Lending Act

Plaintiffs Alkhatib, Tuhin, Dong, Freire, Chowdhury, and Gabrys maintain TILA claims against the Dealership Defendants.[7]

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[7] Although the Dealerships also violated TILA with respect to Plaintiffs Ahmed, Banon and Park, these three plaintiffs' complaints were filed after the passing of TILA's statute of limitations.

To establish violations of TILA, Plaintiffs must prove that the Dealership Defendants are "creditors;" and that they failed, prior to the consummation of the transactions, accurately to disclose the "finance charge," "amount financed," or the "APR."

A disclosure is inaccurate if the amounts disclosed are off by more than $10 dollars, if the disclosure is not provided by the creditor to the consumer, or if the disclosure is not "clear and conspicuous." 15 U.S.C. § 1638(a); 12 C.F.R. §§ 1026.17, 1026.18(d)(2).

The first element – that the Dealerships were "creditors" – is proven here as a matter of law. As Judge Gold recognized in his Report and Recommendations, regulatory guidance provide that, "[i]f an obligation is initially payable to one person, that person is the creditor *even if the obligation by its terms is simultaneously assigned to another person*." *Alkhatib*, 2015 U.S. Dist. LEXIS 72055, at *67 (quoting 12 C.F.R. pt. 226, supp. I, subpt. A, cmt 2(a)(17)(i)(2) (emphasis in original)). Because there is no dispute that the RICs were originally payable to the Dealership Defendants, the Dealership Defendants are "creditors" for purposes of TILA.

As to the second element, Plaintiffs will prove at trial that the Dealerships required them to obtain financing and to purchase various "add-ons" as a condition of providing financing. These "add-ons" include fees for gap insurance, service contracts, and other products that the plaintiffs did not need or want, but which Defendants nonetheless said were required to obtain financing. Because Plaintiffs were told that they were required to purchase these "add ons" before credit would be extended, inflated amounts therefore constitute a hidden "finance charge" and should have been disclosed as such. *See* 15 U.S.C. § 1605(a) (defining "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit").

Additionally, several Plaintiffs will prove that that their cash payments were not accurately reflected on the RICs and that this resulted in inaccurate disclosure of the amount financed, finance charge and/or the APR, or that they were provided with inconsistent or conflicting disclosures that violated TILA's requirement that disclosure of the amount financed, finance charge and APR be clear and conspicuous.

F. Damages

Plaintiffs seek compensatory damages, punitive damages, treble damages, statutory damages, and attorneys' fees, as set forth in the Joint Pretrial Order.

1. Effect of Prior Settlements

Although Plaintiffs have received important compensation for their losses through settlements with the bank defendants, the remaining Defendants have failed to plead or otherwise invoke the protection of N.Y. Gen. Obl. Law 15-108(a) and have therefore waived their right to claim an offset against any future compensatory award. *Chubb & Son Inc. v. Kelleher,* 2006 U.S. Dist. LEXIS 67879, at *15-16 (E.D.N.Y. Sept. 21, 2006) (revised on other grounds).

Even if Defendants are entitled to offset the previous settlement amounts against any future compensatory awards, the settlements do not negate Plaintiffs' entitlement to punitive damages, statutory damages, treble damages, costs and fees. Indeed, Section 15-108(a) is clear that a prior settlement "does not discharge any of the other tortfeasors from liability." Rather, it is appropriate to allow the jury to be instructed on the out-of-pocket damages as they would have been calculated prior to other settlements and apply the offsets after verdicts are obtained. *E.g.*, *Chubb & Son Inc. v. Kelleher*, 2010 U.S. Dist. LEXIS 141842, at *33-34 (E.D.N.Y. Oct. 22, 2010); *Twenty First Century L.P. I v. LaBianca*, 2001 U.S. Dist. LEXIS 7494, at *17 n.4, *21-22

(E.D.N.Y. May 1, 2001). Finally, subject to offset, Plaintiffs are entitled to pursue treble actual damages pursuant to their RICO claims.[8]

2. The Dealership's Corporate Veils Should Be Pierced

Plaintiffs will prove at trial that the Dealerships were nothing more than alter egos of Mr. Eltouby and that it would not be proper to recognize their corporate existence separate from him personally. "New York law requires the party seeking to pierce a corporate veil to make a two-part showing: (i) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997). Determining whether there was complete domination is "fact intensive," and the Second Circuit has identified ten relevant factors to consider, *MAG Portfolio Consult, GmbH v. Merlin Biomed Group, LLC*, 268 F.3d 58, 63 (2d Cir. 2001), which Plaintiffs will address through evidence they have prepared for trial.

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[8] *E.g.*, *Allstate Ins. Co. v. Kumar*, 2013 U.S. Dist. LEXIS 77850, at *10 (S.D.N.Y. June 3, 2013) (holding in RICO case "Settlements made before judgment is entered should be offset after trebling damages."); *In re Crazy Eddie Sec. Litig.*, 948 F. Supp. 1154, 1169 (E.D.N.Y. 1996) (holding in RICO case, "In cases where plaintiffs are entitled to trebled damages under federal law, courts have generally upheld the trebling of damages before crediting settlement payments."); *cf. State of N.Y. v. Hendrickson Bros.*, 840 F.2d 1065, 1086–87 (2d Cir. 1988) (holding in Clayton Act case "An amount recovered by a plaintiff from a coconspirator in settlement of the former's antitrust claims is not deductible from the amount of damages determined by the jury, though it may be deductible from the damages award after it has been trebled"); *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 601 (2d Cir. 1989) (mentioning in RICO case dicta "analytically dissimilar cases in which a plaintiff sues multiple defendants for treble damages, settles with one or more of them, and then prevails at trial against the remaining defendants. In such cases, we have held that it is proper to treble the damage award before crediting settlement payments.")

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request a trial date at the Court's convenience.

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